

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

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4 SECURITIES INVESTOR

5 PROTECTION CORPORATION,

6 Plaintiff,

7 v. Adv. Case No. 08-01789(SMB)

8 BERNARD L. MADOFF

9 INVESTMENT SECURITIES

10 LLC,

11 Defendant.

12 - - - - - x

13 U.S. Bankruptcy Court

14 One Bowling Green

15 New York, New York

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17 August 24, 2016

18 10:10 AM

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21 B E F O R E :

22 HON STUART M. BERNSTEIN

23 U.S. BANKRUPTCY JUDGE

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1 Hearing re: Motion for Order Authorizing Deposition of
2 Bernard Madoff by Chaitman LLP and Conference Regarding
3 Madoff Deposition

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25 Transcribed by: Dawn South

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1 P R O C E E D I N G S

2 THE COURT: Madoff?

3 (Pause)

4 THE COURT: Go ahead.

5 MS. CHAITMAN: Good morning, Your Honor. Helen
6 Davis Chaitman on behalf of --

7 THE COURT: Just keep your voice up.

8 MS. CHAITMAN: Sure. Helen Davis Chaitman on
9 behalf of a large number of customers.

10 We've moved to take Mr. Madoff's depositions on
11 some of the issues that we enumerated in our papers, and the
12 defense counsel have all coordinated, we're all working
13 together. The trustee asked that someone be lead counsel.
14 Everyone has agreed that I could serve as lead counsel.
15 We've worked out what we think will be an efficient way of
16 handling the deposition so that we don't repeat questions.

17 And as to the objection to Your Honor I wanted to
18 briefly focus on the Picauer's objection. I think we're at
19 a point in the clawback litigations where it's terribly
20 important that the defendants have a full opportunity to
21 explore the facts supporting some of their defenses. And
22 while I appreciate that we're not entitled to take discovery
23 in order to supplement a complaint against the Picauers, I
24 think that their issue can be dealt with simply by an order
25 which says precisely that.

1 If Mr. Madoff, and I won't ask questions, nobody I
2 think is going to ask questions about Mr. Picauer --

3 THE COURT: But if -- well, I'm not saying that
4 you can't ask the questions, he's obviously going say based
5 upon the declaration put in that Picauer created the Ponzi
6 scheme, so.

7 MS. CHAITMAN: But the Picauers anticipate that
8 his -- the numerated areas will result in his mentioning
9 Picauer.

10 THE COURT: Well it could.

11 MS. CHAITMAN: The simple way to deal with that is
12 to simply enter an order saying anything that he testifies
13 to in his deposition cannot be used to frame a complaint
14 against the Picauers.

15 THE COURT: Can I ask you a question?
16 Mechanically how is the deposition going to work? Are all
17 -- how many people are going to go down to the prison?

18 MS. CHAITMAN: Well I think -- it hasn't been
19 finalized, but I think what we're working on is that only
20 one or two firms would come to the deposition, we would -- I
21 don't think the prison would allow consecutive days -- so
22 what we're thinking is we would take a day, we would
23 circulate the transcript to all defense counsel, we could
24 then filter the questions based on that day, and then we
25 would go down, just one or two attorneys, and then we'll

1 complete that process, and it may very well be that
2 individual defense counsel will have questions base solely
3 on their situations, and then we'll sort that out. But I
4 think we've developed an efficient way of handling --

5 THE COURT: Are you proposing two people --
6 whatever -- two people go down, have a preliminary
7 deposition, and after review of the transcript have follow-
8 up questions?

9 MS. CHAITMAN: Yes. And that would all be handled
10 by one attorney, unless people had specific issues that they
11 wanted to cover, and it would only be one person obviously
12 asking questions at a time.

13 THE COURT: Okay. One of the issues raised by the
14 defense, which may narrow the deposition, is in most of the
15 cases, I think all but three it doesn't really matter if the
16 Ponzi scheme started in 1981 or on January 1st, 1992, and I
17 guess my question for the defendants is, are you prepared to
18 concede for the purposes of these 80 whatever number of
19 cases that the Ponzi scheme started January 1st, 1992? I
20 should say the plaintiffs. Sorry. Is Mr. Picard prepared
21 to concede that so that you don't have to take discovery
22 about what occurred before 1992?

23 MR. MURPHY: Your Honor, Keith Murphy, Baker
24 Hostetler for the trustee.

25 Just for purposes of the record and clarity, we're

1 certainly not prepared to concede that the Ponzi scheme or
2 the fraud did not start prior to 1992.

3 THE COURT: Even in these cases?

4 MR. MURPHY: Even if these cases.

5 THE COURT: Okay.

6 MR. MURPHY: I think it's not relevant.

7 MS. NEVILLE: Your Honor, may I be heard for a
8 minute?

9 THE COURT: Well let me just hear --

10 MS. NEVILLE: It's on that particular issue on the
11 date.

12 THE COURT: All right. Go ahead. Ms. Neville, go
13 ahead, I'll hear you.

14 MS. NEVILLE: Carole Neville from Dentons.

15 Your Honor, last night we looked again at the
16 Madoff allocution, and actually what he says is that the
17 fraud began in the early '90s. So I don't know that in fact
18 the fraud began in 1992 and I --

19 THE COURT: He testified in another deposition
20 though --

21 MS. NEVILLE: I understand that he said that --

22 THE COURT: -- that it was 1992.

23 MS. NEVILLE: -- but I don't know that there were
24 follow-up questions on that. And I went back last night and
25 checked on some of my cases, and the difference between one

1 year in Madoff could actually move the needle.

2 THE COURT: Well it doesn't matter because he's
3 not -- the trustee is not prepared to concede --

4 MS. NEVILLE: Right.

5 THE COURT: -- for the purposes of the case --

6 MS. NEVILLE: I know, but this --

7 THE COURT: -- that it began then. All right.

8 MS. NEVILLE: For the record it is clear 1992 is
9 the --

10 THE COURT: So tell me about the areas that you
11 propose to inquire into on the first day.

12 MS. CHAITMAN: Well I think there are two areas on
13 the first day that I'd like to cover, Your Honor, although I
14 want to cover all the areas that we listed in our papers,
15 but --

16 THE COURT: Some of them are a little amorphous.

17 MS. CHAITMAN: You know, I think in fairness to
18 the defendants, Your Honor, since we've never had the
19 opportunity to question Mr. Madoff, except for the very
20 limited proffer withdrawal deposition --

21 THE COURT: That's because nobody sought his
22 deposition before July.

23 MS. CHAITMAN: I'm sorry?

24 THE COURT: No one sought his deposition before
25 July other than the profit withdrawal orders.

1 MS. CHAITMAN: Yeah. Actually when we had the
2 profit withdrawal motion I did suggest that we'd be opened
3 up for all the clawback defendants at that time, and Your
4 Honor deferred on that.

5 THE COURT: Right.

6 MS. CHAITMAN: But in any event, the two threshold
7 areas are when did the Ponzi scheme actually begin, and then
8 to what extent did the Ponzi scheme, if at all, overpower
9 the legitimate trading operations?

10 I've discussed this with you in the past, Your
11 Honor, and as Your Honor noted, there are cases which say if
12 the Ponzi scheme is a small percentage of an otherwise
13 legitimate operation it might not justify the Ponzi scheme
14 presumption.

15 THE COURT: Did I say that? I don't know.

16 MS. CHAITMAN: Yeah, you did.

17 THE COURT: Okay.

18 MS. CHAITMAN: Well you acknowledged that --

19 THE COURT: I say a lot of thing, so.

20 MS. CHAITMAN: -- you acknowledged the cases --

21 THE COURT: Yes.

22 MS. CHAITMAN: -- existed.

23 THE COURT: Okay. And what else do you want to --
24 so what you're really -- I mean we've kind of been assuming
25 this is an on/off switch, but what you really want to ask is

1 when he started to manufacture fictitious trading and when
2 he stopped making actual trades, assuming he ever stopped to
3 make actual trades.

4 MS. CHAITMAN: With respect to the defendants.

5 THE COURT: Right.

6 MS. CHAITMAN: Yeah. I mean he may have done
7 something else with the unmentionable person, but -- and a
8 few others, but clearly with respect to the defendants who
9 are innocent, non-co-conspirator defendants we want to focus
10 on that.

11 THE COURT: All right.

12 MS. CHAITMAN: And --

13 THE COURT: And what else?

14 MS. CHAITMAN: -- then we want to focus on the
15 recordkeeping. We want to focus --

16 THE COURT: Why do you want to ask about the
17 recordkeeping? You know, what's he going to know?

18 MS. CHAITMAN: Well I think, you know, based on my
19 limited deposition of him he has a complete picture of the
20 recordkeeping.

21 THE COURT: But what are you going to ask him
22 about the recordkeeping?

23 MS. CHAITMAN: Well, for example, Your Honor, his
24 testimony on the profit withdrawal issue was that up until
25 -- the cutoff date that he gave me was -- he said it started

1 some time in 1992, and I said, well can we safely say that
2 as of December 31, 1991 the trades were all legitimate? He
3 said, yes, definitely.

4 So if we use that as the cutoff date what I want
5 to do, and I disagree with the trustee's calculation that it
6 only impacts three cases, I haven't had time to go through
7 all of my cases, but I don't believe that's accurate,
8 because you have to take into consideration the interaccount
9 transfers and --

10 THE COURT: Well I thought the trustee did that or
11 at least --

12 MS. CHAITMAN: Well --

13 THE COURT: -- the experts, Mr. Greenblatt (ph) I
14 think said he had done that.

15 MS. CHAITMAN: Okay. I haven't had -- I don't
16 believe that's accurate, but I haven't had a chance to go
17 through all my cases.

18 But what we're hoping to get out of Mr. Madoff is
19 not simply when the fraud began, but how Madoff's records
20 will prove that there were actual trades prior to that time.
21 And it wasn't specifically relevant to the profit withdrawal
22 issue, and I didn't go into it at that deposition, but he
23 did mention some of the traders who handled the trades that
24 were done for the investment advisory customers, and I want
25 to explore with him what records Madoff had and perhaps some

1 of those records still exist, there may be some way that we
2 can actually prove this.

3 THE COURT: So you want to ask him about records
4 of actual trading?

5 MS. CHAITMAN: Yes.

6 THE COURT: Okay. What else do you want to ask?
7 What other areas?

8 MS. CHAITMAN: Obviously there may be questions
9 specific to some of my clients.

10 THE COURT: But I thought that wasn't going to be
11 the first day though.

12 MS. CHAITMAN: No, it wouldn't be the -- oh, the
13 first day?

14 THE COURT: Just about the first day, yeah.

15 MS. CHAITMAN: Yeah. I think that that would be
16 the first day, Your Honor.

17 THE COURT: All right.

18 MS. CHAITMAN: And subject to whatever he would
19 say that would lead to something else. So basically --

20 THE COURT: Does anybody else disagree that on the
21 defendants' side that that's the scope of the first day?

22 MR. RICH: Your Honor, for the for the record,
23 Robert Rich, Hunton & Williams on behalf of the
24 (indiscernible) defendants.

25 I would just add to the scope of the first day

1 that we would want to ask about the interpretation of some
2 of the account records generally, the monthly statements.
3 You know, we've heard that the trustee's experts are going
4 to testify on this issue, we've requested to take deposition
5 and learn more about that.

6 THE COURT: But in what sense?

7 MR. RICH: Well, you know, I've looked through the
8 records and I've had a hard time figuring out how those
9 monthly statements show what deposits were made into an
10 account, and I've yet to be able to figure it out, and I'd
11 like to ask about just how to interpret these records
12 generally.

13 THE COURT: You really think he's going to know?

14 MR. RICH: I mean he's the head of the company --

15 THE COURT: No.

16 MS. CHAITMAN: He will know, Your Honor, because
17 we did that with the profit withdrawal statements, he knew
18 exactly --

19 THE COURT: But that sounds like particular
20 defendant questions. In other words, you'll show him an
21 account statement from your client I assume -- the clients
22 and you'll say what does this mean?

23 MR. RICH: Yeah, Your Honor, I think this is more
24 of how to interpret the account statements generally. I
25 mean I do have some questions specific to ours, but I think

1 there's a more general question.

2 THE COURT: So what general question do you want
3 to ask him about the accounts statements?

4 MR. RICH: So like, you know, here's a set of
5 monthly statements, what the trustee is using to say this is
6 the amount deposited, this amount withdrawn. I don't see
7 how like these statements show all that information, and
8 maybe he can say why.

9 THE COURT: Are you going to show him a statement
10 that shows -- I guess I don't understand. I thought that
11 the monthly statements would reflect cash deposits and
12 withdrawals, don't they?

13 UNIDENTIFIED SPEAKER: They do.

14 THE COURT: So beyond that what would you ask him?

15 MR. RICH: You know, I don't --

16 THE COURT: When did they actually occur I guess.
17 How's he's going to --

18 MR. RICH: I'm looking at the statement and I'm
19 looking at the trustee's summary, you know, attached to the
20 complaint of what those statements say and I'm having
21 trouble reconciling them.

22 THE COURT: But the -- he didn't prepare the
23 trustee's summary. You have to figure that out from either
24 the trustee's records or the trustee will at some point have
25 to explain it.

1 MR. RICH: But I need to --

2 THE COURT: That's filed. Did you take the --
3 first of all the trustee didn't do anything, he had experts
4 -- did you take the expert depositions?

5 MS. CHAITMAN: If I may just say something, Your
6 Honor. When I questioned Mr. Madoff about the profit
7 withdrawal statements I believe his testimony was that where
8 it says buy it actually meant sell, and where it says sell
9 it actually meant buy. A little counterintuitive, but his
10 explanation, which I never would have anticipated, was that
11 he -- the -- from the customer's perspective it was being
12 bought and sold from and to Madoff.

13 In other words, what he began to testify was that
14 Madoff had the inventory because he had such massive
15 positions, he explained it, he was doing trades equal to 10
16 percent of the daily volume on the stock exchange so that
17 when he says in the statement and someone with my limited
18 intelligence looks at it if it says buy I would have thought
19 that meant that the customer bought it. It's not what it
20 meant. It meant that it was bought by Madoff from the
21 customer and it was put back into Madoff's inventory.

22 So all I'm saying is these are very complicated
23 issues and they're not apparent on the face of the
24 statements, so I think what Mr. Drake is saying is that we
25 just need to question him. He knows all this stuff.

1 THE COURT: Right.

2 MS. CHAITMAN: He had a very, very clear ability
3 to testify as to what the (indiscernible) entries meant.

4 THE COURT: Anything else?

5 MR. KRATENSTEIN: Your Honor, Andrew Kratenstein,
6 I represent the Sage defendants.

7 And Ms. Chaitman may have covered this when she
8 said that one of the topics was the extent to which the
9 Ponzi scheme overcomes the legitimate trading. Just to put
10 a fine --

11 THE COURT: No, I understand. That's why I said
12 it's not an on/off switch.

13 MR. KRATENSTEIN: Right. Just to put a finer
14 point on that, because I want to be clear since you're
15 asking about scope.

16 One of the questions about scope is whether the
17 Ponzi scheme extended beyond the so-called split strike
18 strategy or went to the so-called directed trading and
19 (indiscernible) bond arbitrage that Mr. Madoff did with a
20 number of accounts, including my clients' accounts.

21 THE COURT: These are not investment advisory
22 accounts?

23 MR. KRATENSTEIN: They were investment advisory
24 accounts, but they were different. They were not in split
25 strike for the entirety of the period, which is relevant

1 because if he's admitted to a "split strike Ponzi scheme"
2 that's one thing, but if he's saying that that's the scope
3 of the Ponzi scheme, it didn't go beyond "split strike" --

4 THE COURT: Okay.

5 MR. KRATENSTEIN: -- then that's relevant.

6 MS. NEVILLE: Your Honor, Carole Neville.

7 To add to that, in 1997 apparently a large number
8 of these so-called arbitrage accounts were switched over to
9 split strike conversion and it happened in six of my
10 accounts, and I'd like to find out what actually occurred
11 that the point. That was --

12 THE COURT: It sounds like this --

13 MS. NEVILLE: -- the summer of 1997.

14 THE COURT: It sounds like that's a specific
15 question about specific --

16 MS. NEVILLE: It covers --

17 THE COURT: -- accounts, and I thought that the
18 first day was more of a general type of thing, otherwise
19 just do it in one day.

20 MS. NEVILLE: But this is -- covers a large number
21 of clients, so it may play into this idea that there was
22 some separate activity in the Madoff operations that held
23 those arbitrage accounts and others -- accounts from the
24 same period as split strike conversion.

25 THE COURT: All right. Anything else?

1 MS. CHAITMAN: I think that's it for the first
2 day, Your Honor.

3 THE COURT: Let me hear from the trustee.

4 MR. MURPHY: Good morning, Your Honor. Keith
5 Murphy, Baker Hostetler, counsel for the trustee.

6 Your Honor, just to begin, there are 83 adversary
7 proceedings impacted by these folks --

8 THE COURT: Right.

9 MR. MURPHY: -- including Ms. Chaitman and the 6
10 people who have filed. That relates to 136 BLMIS accounts
11 in those 83 adversary proceedings.

12 We raised several issues in our response. The
13 first is with respect to those cases where fact discovery
14 was already closed --

15 THE COURT: Right, and I said that I wouldn't
16 extend it for those, and I'm not going to.

17 MR. MURPHY: Okay, great, then I don't think there
18 was any objection to that. So that would be fine.

19 The second category, Your Honor, are those cases
20 where fact discovery was still open as of July 7th but is
21 closing, was about to close, or will close during this
22 process.

23 So we would request, Your Honor, that the -- that
24 just because of this process that the case management order
25 deadlines that are previously set in all of these cases not

1 be modified. They shouldn't be extended as a result of this
2 process.

3 THE COURT: Well I said that I would -- if I'm
4 going to allow the deposition of Madoff I'm obviously going
5 extend it for that purpose.

6 MR. MURPHY: Agreed, and that's what we discussed
7 at the July 20 hearing. I did clarify at the time, Your
8 Honor, that I would just -- we were asking that it just be
9 extended for purposes of taking Mr. Madoff's deposition and
10 then to allow the trustee to rebut anything that he might
11 say.

12 THE COURT: Well, I don't know if I would do that,
13 but why don't we just leave it that they can take the
14 deposition and then we'll see what happens after that.

15 MR. MURPHY: That's fine, Your Honor.

16 I would just add during that July 20 hearing, I
17 don't know that you had a chance to look at the transcript,
18 but the point I made at that time was that this process
19 shouldn't be used to hit restart on all of discovery for the
20 defendants now that it's coming towards the end or near the
21 end of their fact discovery deadline. I think the Court
22 understood that point and said it agreed.

23 With respect to the start date of the fraud, Your
24 Honor, the 1992 date was not something that we picked, it
25 was something that occurred in the notices and

1 Ms. Chaitman's motion. They have based their questions --

2 THE COURT: Yeah, but --

3 MR. MURPHY: -- around 1992.

4 THE COURT: I understand that -- well they're
5 asking for information prior to 1992 and that's why I asked
6 if you're prepared to concede for the purposes of the --
7 these adversary proceedings that the start date was
8 January 1st, 1992. If you were a lot of those requests for
9 pre-1992 information go away, but since you're not it
10 doesn't matter.

11 In other words, if you're going to contend that,
12 for example, the Ponzi scheme started in the late '80s
13 they're entitled to information about what was going on in
14 BLMIS in the late '80s and in particular whether BLMIS was
15 involved for instance in 100 percent legitimate trading.

16 MR. MURPHY: Well with respect to those people,
17 Your Honor, who believe that the fraud started in January of
18 1991 -- 1992, excuse me, or some time thereafter, this is a
19 strict that liability case, I think at that point the
20 activity that took place prior the that point is irrelevant.

21 THE COURT: I don't know. I don't know. If they
22 were relevant you'd just concede it.

23 MR. MURPHY: Well, Your Honor, maybe because, for
24 example, Ms. Neville has not consented to the 1992 date me
25 conceding even the 1992 date wouldn't necessarily have that

1 effect.

2 THE COURT: All right. I'm not saying you have to
3 do it --

4 MR. MURPHY: Okay.

5 THE COURT: -- I was just asking. I thought it
6 might streamline things. But go ahead.

7 MR. MURPHY: Why don't we just -- we have put the
8 details in our response, I don't think I need to go through
9 it here with respect to why the adversary proceedings were
10 or were not affected by 1992 given the discussion here
11 today.

12 For example, 80 of the adversary proceedings, 61
13 of those accounts that were involved in that -- in those
14 adversary proceedings were opened after 1992 and had no
15 affect from anything prior to 1992.

16 The second prong it relates to 61 of the accounts.
17 And with respect to those accounts, while they may have been
18 opened after 1992 and they may have -- or been affected by
19 something prior to 1992 such as from an interaccount
20 transfer, after all the calculations are made and taken into
21 account those people still had withdrawn more funds prior to
22 the two-year period such that there was no principal left.
23 It would not change their fictitious profit calculation.

24 Your Honor, I would just ask if a deposition is
25 authorized that we would limit the areas approved by the

1 Court, any deposition not be used for purposes of getting
2 testimony for use in other proceedings for the profit
3 withdrawal or Picauer.

4 THE COURT: I don't know how I'd do that though.

5 MR. MURPHY: I think maybe it would be --

6 THE COURT: For example --

7 MR. MURPHY: -- the questions would be --

8 THE COURT: -- assume Ms. Chaitman has some
9 clients or maybe not where the discovery cutoff has run. Do
10 you have any of those?

11 MS. CHAITMAN: I have some clients where the
12 discovery cutoff has run.

13 THE COURT: All right. So but if we're litigating
14 in those particular cases and Mr. Madoff has said, you know,
15 the scheme began on January 1st, 1992 how do I not use that
16 information?

17 MR. MURPHY: Right, Your Honor --

18 THE COURT: Or anybody else for that matter.

19 MR. MURPHY: I think maybe Your Honor would have
20 to be perhaps after the deposition when counsel goes through
21 it to see if there are any areas which either the trustee or
22 for example counsel for the Picauer find were beyond the
23 scope or would want to have --

24 THE COURT: Well that's different.

25 MR. MURPHY: That's a request we would make also,

1 Your Honor, to have a procedure by which there would be
2 sufficient time to do that.

3 THE COURT: The same procedure we had in the
4 profit withdrawal order.

5 MR. MURPHY: Right, Your Honor.

6 With respect to the deposition, Your Honor, I
7 would ask -- Ms. Chaitman I think suggested a two-day
8 process. I would request a one-day process or at least that
9 people be prepared in the event that it happened over one
10 day such that if the deposition were relatively short and we
11 were all there and waiting for all afternoon people would be
12 able to review what --

13 THE COURT: Well the idea of this is I think so a
14 lot of people don't have to traipse down to the prison,
15 which I understand is a problem any way with the prison
16 authorities.

17 MS. CHAITMAN: It is. They have -- the deposition
18 room is a very small room --

19 THE COURT: Right.

20 MS. CHAITMAN: -- it doesn't comfortably hold more
21 than six people.

22 THE COURT: And, you know, maybe you can convince
23 people between the first day and the second day that as to
24 their particular cases -- Ms. Chaitman has a lot of cases so
25 this may not be true of her -- but to those who only have

1 one or two cases it's just not worth the effort to go down
2 and ask him any questions. Maybe you can enter into a
3 factual stipulation with them. If you can satisfy them then
4 it doesn't make a difference as long as he testifies clearly
5 that -- I'm not saying he will --

6 MR. MURPHY: Right.

7 THE COURT: -- that on January 1st, 1992 I no
8 longer -- after that date I no longer made a legitimate
9 trade and basically, you know, the switch was turned onto
10 the Ponzi scheme.

11 But I think the two days, if nothing else, to
12 accommodate the prisons and to limit, you know, the amount
13 of time, because what I'm hearing you can't do more than one
14 day in a row any way if that's (indiscernible). But that
15 makes sense. Then the only question is the scope. Do you
16 have any problems with the scope?

17 MR. MURPHY: Just what I've said before, Your
18 Honor, and contained in our response. So --

19 THE COURT: All right.

20 MR. MURPHY: -- I would adopt our response to the
21 extent not discussed here, Your Honor.

22 THE COURT: Subject to seeing exactly what
23 procedure you're adopting or how you're going to go about
24 doing this, how many people are going to go, you can ask him
25 any questions -- the scope -- the appropriate scope is when

1 the Ponzi scheme began, which includes whether he continued
2 to make legitimate trades --

3 MS. CHAITMAN: Right.

4 THE COURT: -- and you didn't mention it, but
5 whether there are records that show allocations to
6 particular accounts of those trades. I don't know how you
7 figure it out if he says yes, I made a legitimate trade of X
8 and I didn't allocate it and then you go through everybody's
9 statement to figure out how it should be allocated, but to
10 the extent he continued to make legitimate trades after
11 whatever the start date is that might be reflected in the
12 statements.

13 You can ask him that recordkeeping question. I
14 don't quite understand about how buy is sell and sell is
15 buy, but I guess there's a lot I don't understand.

16 And you can ask him general questions about random
17 account statements they conduct particular entries mean if
18 you have an account statement that has a lot of these
19 entries as an example in terms of whether, you know, a buy
20 is a sell and a sell is a buy and when it says there's as
21 withdrawal if it's actually a withdrawal of cash, and
22 whether there -- when there's a deposit whether it's an
23 actual deposit of cash, although I think the trustee's
24 experts have gone through the bank records and confirmed
25 that those deposits and withdrawals are accurate, and I

1 think the second circuit is satisfied that they are
2 accurate.

3 MS. CHAITMAN: But the trustee's bank records
4 start in December 1998, Your Honor.

5 THE COURT: All right. Okay.

6 MS. CHAITMAN: And then the other area that I had
7 raised was the extent to which the Ponzi scheme overwhelmed
8 the legitimate trading, which continued until --

9 THE COURT: Well that's kind of the more general
10 question of did he continue to engage in legitimate trading.

11 MS. CHAITMAN: Okay. As long as we understand
12 that that's the area that I wanted to cover.

13 THE COURT: Yeah. No, I recognize the issue and
14 I've used the analogy several times of an on/off switch.
15 That may not be an accurate way to describe --

16 MS. CHAITMAN: Right.

17 THE COURT: -- what happened, so you can certainly
18 can him whether he engaged or whether BLMIS engaged in
19 legitimate trading --

20 MS. CHAITMAN: Right.

21 THE COURT: -- afterwards, and was there a point
22 which it stopped?

23 MS. CHAITMAN: Right.

24 THE COURT: That he was no longer engaged, at
25 least in the IA business in legitimate trading.

1 MS. CHAITMAN: Well but that's the issue. The IA
2 business, just to use a very simplistic measure, the -- of
3 approximately 200 employees even in 2008 only 12 were
4 involved in the IA business.

5 THE COURT: Well, you know -- and I know what
6 you're saying and I've heard the argument, but if your
7 clients invest -- were in the IA business and the IA
8 business was run as a Ponzi scheme the fact that it wasn't
9 separately incorporated and it was run as a division of
10 BLMIS it's probably not going convince me that it wasn't a
11 Ponzi scheme.

12 MS. CHAITMAN: Well --

13 THE COURT: I've had other cases where the debtor
14 may have a legitimate operation but he's also running a
15 Ponzi scheme, and if you invested in the Ponzi scheme rather
16 than the legitimate operation you've invested in a Ponzi
17 scheme. That's all I'm saying.

18 MS. CHAITMAN: Okay. Obviously we'll argue the
19 merits --

20 THE COURT: I don't know how he's going to know
21 that, I think you'd have to determine from the records the
22 trustee has what percentage of income -- although if it's a
23 Ponzi scheme I guess the income is really ephemeral -- but
24 what percentage of income was earned from the IA side and
25 what percentage was earned from the other side. I

1 understand it was the IA side that supported the other
2 businesses, but you know, you've raised this issue and I've
3 said in the past you can question him about that.

4 MS. CHAITMAN: Okay.

5 THE COURT: I don't know what he's going to know
6 -- you know, he's going to have that information on his
7 fingertips if you're talking about strict numbers or ratios.

8 MR. MURPHY: Your Honor, I think a lot of that
9 will be elucidated by the trustee's experts at the proper
10 time.

11 THE COURT: I know.

12 MR. MURPHY: Two questions.

13 THE COURT: Yeah.

14 MR. MURPHY: One, we would ask that the deposition
15 be scheduled without delay. Obviously there is --

16 THE COURT: Subject to the prison obviously.

17 MR. MURPHY: Fine.

18 And then the second question, Your Honor, is
19 really a question relating to discovery. Going back to that
20 there are certain deadlines that are going on, or passing
21 with fact discovery --

22 THE COURT: I haven't --

23 MR. MURPHY: -- are you going to address --

24 THE COURT: I haven't extended any deadlines other
25 than to take Mr. Madoff's deposition. Whether someone can

1 come in and make a compelling case, one that they didn't
2 take the deposition earlier and they should have more time
3 to do follow-up depositions, as you seem to be saying, we'll
4 deal with it at that time.

5 MR. MURPHY: Thank you, Your Honor.

6 THE COURT: So I'm not extending your time to take
7 any discovery either in any of these cases.

8 MR. MURPHY: Thank you, Your Honor.

9 THE COURT: Why don't you circulate a proposed
10 order.

11 Oh, let me add one other thing since it was
12 raised --

13 MR. MURPHY: Oh, sorry.

14 THE COURT: -- about Picauer when I got an
15 objection.

16 Obviously -- I say obviously -- but it seems like
17 Madoff is going to testify that Picauer created the Ponzi
18 scheme, and that's -- you know, but that's -- if that's
19 relevant to when the Ponzi scheme began he can certainly
20 testify to it. What you can't do is ask questions about and
21 what did he do -- and what did Picauer do in 1993 and what
22 did he do in 1994 and things like that, because that's well
23 beyond the scope of it and I think the Picauer parties have
24 a legitimate objection on that basis.

25 MR. RICHARDSON: Yes, Your Honor. Mark

1 Richardson, Schulte Roth & Zabel on behalf of Picauer.

2 THE COURT: See I just made your argument for you.

3 MR. RICHARDSON: Sorry?

4 THE COURT: I just made your argument for you,
5 right?

6 MR. RICHARDSON: You did. And I'll be brief in
7 that regard.

8 THE COURT: Okay.

9 MR. RICHARDSON: We're here, you know, for the
10 limited purpose of trying to get -- or ask the Court for the
11 same type of --

12 THE COURT: Oh, but he had one other thing. Since
13 you've offered it I'll include the proviso that the
14 information can't be used to draft something against the
15 Picauers (indiscernible) parties.

16 MR. RICHARDSON: And respectfully, Your Honor, I
17 don't think it stops there. I mean Ms. Chaitman has been
18 forthright in saying that she's not going to ask questions
19 about Picauer and she's not going use his deposition
20 testimony to draft a new complaint, but it goes beyond that.
21 I mean this could be a spring board for other things and
22 that's really our concern is that if there isn't a
23 limitation on the scope and a broad limitation on use that
24 Ms. Chaitman could, for example, use day one of Madoff's
25 deposition to make a further motion to ask more questions

1 about Picauer during day two.

2 THE COURT: But she can always make a motion then
3 you could oppose it. All right. I meant to ask, and maybe
4 I didn't understand the procedure, are you then going to
5 come back before day two and get a further order defining
6 the scope of the second day?

7 MS. CHAITMAN: If that's what Your Honor wants.

8 THE COURT: Yeah, I think that probably makes
9 sense just to --

10 MS. CHAITMAN: Okay.

11 THE COURT: -- give the -- keep a --

12 MS. CHAITMAN: Okay.

13 THE COURT: -- control on this and maybe some of
14 these issues can be resolved. It doesn't sound like it, but
15 maybe they can.

16 MS. CHAITMAN: Okay.

17 THE COURT: So let's just say this is one day
18 only, these are the issues subject to the right to come back
19 to ask further questions. Okay?

20 MR. RICHARDSON: And just for the record, Your
21 Honor, I don't think there's any reason to suspect that
22 Madoff will testify that Picauer created the fraud based on
23 these --

24 THE COURT: But he put it in an affidavit.

25 MR. RICHARDSON: Right, but based on these topics.

1 Nothing I heard from these topics that are being sought
2 would require factual discovery about Picauer.

3 THE COURT: I disagree. I think they can ask him
4 how did it come about. Or when did it come about and how
5 did it come about.

6 MR. RICHARDSON: Well when did it come about is a
7 very different question from how did it come about.

8 THE COURT: I'm not going to limit the deposition
9 in that sense. As long as he's not asked questions about
10 what did Picauer do --

11 MR. RICHARDSON: I understand.

12 THE COURT: -- you know, things like that,
13 although then, you know, why he -- or how he -- you know,
14 almost the basis of the statement he created it since it's
15 out there any way, but he can't ask how did Picauer aid and
16 abet it.

17 MR. RICHARDSON: Right, and that's helpful, but I
18 do think there is still a concern that if the door is open a
19 crack it will be used to create a back door later.

20 THE COURT: Why don't you deal with that in terms
21 of limiting the use of it in this order with a right to go
22 through the questions. It's the same order --

23 MR. RICHARDSON: Right.

24 THE COURT: -- we had in the PW which
25 (indiscernible) and raise objections that it exceeded the

1 scope.

2 MR. RICHARDSON: Yes, sir.

3 THE COURT: Okay?

4 MR. RICHARDSON: Thank you.

5 THE COURT: Circulate a proposed order.

6 MS. CHAITMAN: Right. You know, I assume that
7 it's -- you know, we had a sealing order last time, but I
8 assume that all defense counsel can -- obviously they need
9 to review the transcript.

10 THE COURT: Well only the defense counsel that
11 participated --

12 MS. CHAITMAN: That participated.

13 THE COURT: -- in these proceedings.

14 MS. CHAITMAN: Right.

15 THE COURT: And not with respect to the cases
16 where the discovery has not been extended.

17 MS. CHAITMAN: No.

18 THE COURT: It may be the same defense counsel, it
19 may not matter, but --

20 MS. CHAITMAN: Right. But --

21 THE COURT: -- if there are any --

22 MS. CHAITMAN: -- I'll give defense counsel that
23 have filed something saying we want to participate.

24 THE COURT: Right.

25 MS. CHAITMAN: Okay. I'll put together a proposed

1 order.

2 THE COURT: Although, Ms. Neville, I looked at the
3 cases you cited in the declaration, I looked at a couple of
4 the adversary proceedings, you said all the accounts were
5 open before 1992 and I didn't see that.

6 MS. NEVILLE: Some of them were transfers. I only
7 listed the accounts that I had that were opened before 1992.

8 THE COURT: Well go back and look at the
9 complaints.

10 MS. NEVILLE: I will go back and look.

11 THE COURT: They may be transfers but that's not
12 what it said in your declaration.

13 MS. NEVILLE: Well but the transfers came from
14 earlier accounts that started -- oh, that's --

15 THE COURT: With your accounts --

16 MS. NEVILLE: -- here -- no, no, no, Your Honor,
17 this is the 1997 issue. Barbara Beardan (ph), for example,
18 opened her account in 1986, the trustee's complaint begins
19 in 1997. That was when her account was switched from an
20 arbitrage to some other account, but it's the exact same
21 person and her account statement --

22 THE COURT: Well it wasn't clear. If that's the
23 case it certainly wasn't clear from your declaration.

24 MS. NEVILLE: Well you can't tell it from the
25 complaint, because the calculation that the trustee uses

1 begins in 1997, but the account by Ms. --

2 THE COURT: With an interaccount transfer.

3 MS. NEVILLE: Exactly.

4 THE COURT: Right, I know. All right.

5 MR. RICHARDSON: So, Your Honor, just to clarify,
6 the limiting order with respect to the confidentiality
7 period and the use restrictions should be the same as the
8 previous limiting orders that have been entered with respect
9 to profit withdrawals?

10 THE COURT: Why is there a confidentiality order?
11 Oh, I guess you want to review the transcript --

12 MR. RICHARDSON: Just a period for counsel to look
13 at.

14 THE COURT: -- for the period -- same
15 confidentiality we have when we say there's a transcript on
16 the ECF?

17 MR. RICHARDSON: Correct.

18 THE COURT: All right.

19 MR. RICHARDSON: Thank you.

20 MR. MURPHY: Thank you, Your Honor.

21 THE COURT: All right. Thank you.

22 (Whereupon these proceedings were concluded at 10:42
23 AM)

24

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I N D E X

RULINGS

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Motion for Order Authorizing Deposition of

Bernard Madoff by Chaitman LLP

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C E R T I F I C A T I O N

I, Dawn South, certify that the foregoing transcript is a
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